SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

No. 73-924

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN PAUL SHELTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a non-jury trial in the United States District for the Northern District of Georgia, petitioner was convicted on two counts of interstate transportation and concealment of a stolen motor vehicle. He was sentenced to five years' imprisonment on each count, the terms to run concurrently. Upon filing a notice of appeal on March 5, 1973, the district court allowed petitioner to be released on a $5,000 surety bond pending appeal. On April 6, 1973, petitioner was so released (Pet. App. 1a), and on June 1, 1973, he filed a *pro se* brief on the merits in the court of appeals. That same day, petitioner fled the jurisdiction of the State of Georgia while the jury was deliberating during his trial on state charges of forgery. He was found guilty on the forgery charges, his state bond was forfeited, and a bench warrant issued. Petitioner remains at large.

On June 18, 1973, the district court held a show cause hearing in response to a government motion to revoke or forfeit petitioner's appeal bond. Petitioner did not appear at the hearing, nor was he represented by counsel. The district court determined that it lacked jurisdiction to order forfeiture of the appeal bond.[1]

The government then filed a motion with the court of appeals to revoke or forfeit petitioner's appeal bond and to dismiss the appeal on the basis that petitioner had absconded and defied the court's authority. On August 2, 1973, the court of appeals conditionally revoked his appeal bond and conditionally dismissed his appeal, 482 F.2d 848 (C.A. 5), certiorari denied, No. 73-413, December 3, 1973 (Pet. App. 2a-5a). The case was remanded to the district court for a hearing, at which time petitioner was to "appear in person (and with counsel, if he wished) and show cause why the conditional revocation of his bond and conditional dismissal of his appeal should not be made final" (*id.* at 5a). On September 18, 1973, the hearing was held (Pet. App. 5a-8a). Petitioner did not appear, as required by the court of appeals, although he was represented by counsel. At that time petitioner's counsel stated that he did not know petitioner's whereabouts, although he had talked to him over the telephone (Pet. App. 6a).

On September 20, 1973, the district court found that "there is no reason why the conditional revocation of Shelton's bond and the conditional dismissal of [his]

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[1]The conditions of the bond were that petitioner appear before the Court of Appeals for the Fifth Circuit, abide by and obey its orders, and surrender himself if his conviction is affirmed. There were no conditions limiting petitioner to a particular geographical area.

appeal should not be made final" (Pet. App. 9a-10a). On November 12, 1973, the court of appeals entered a final and unconditional order revoking petitioner's bail and dismissing his appeal from the revocation of bail[2] (Pet. App. 11a-12a). The petition for a writ of certiorari, which rehashes the same arguments made in the petition for a writ of certiorari filed after the conditional dismissal of the appeal (No. 73-413), and which were fully answered in our Memorandum In Opposition, was not filed until December 13, 1973, and is out of time under Rule 22(2) of the Rules of this Court.

In any event, since petitioner remains a fugitive, further review of the revocation of his appeal bond is not appropriate. *Molinaro* v. *New Jersey,* 396 U.S. 365. Moreover, the dismissal of petitioner's appeal from the judgment of conviction for want of prosecution and for failure to file a timely appeal (see *supra,* n. 2, which took place on January 8, 1974, renders the issue moot.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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[2]The petition for a writ of certiorari is from the November 12, 1973 decision. The dismissal of the appeal from the judgment of conviction occurred subsequent to the filing of this petition. The mandate of the court of appeals issued on January 11, 1974.